

BEFORE THE WASHINGTON STATE EXECUTIVE ETHICS BOARD

In the Matter of:

CHRISTINE O. GREGOIRE and KATHLEEN  
D. MIX,

Respondents.

EEB Case No. 01-101 and No. 01-102

STIPULATION AND ORDER

**I. STIPULATION**

THIS STIPULATION is entered into under WAC 292-100-090 between CHRISTINE O. GREGOIRE and KATHLEEN D. MIX, Respondents, through JENNY A. DURKAN and KENT A. CAPUTO, their respective counsel and the EXECUTIVE ETHICS BOARD ("Board"), through DAVID N. BRUCE, Special Assistant Attorney General. The following stipulation will be binding upon the parties only if accepted by the Board.

**A. Facts**

1. The above-referenced ethics complaint alleges that Attorney General Christine Gregoire ("Gregoire") and Chief Deputy Kathleen Mix ("Mix") caused the State to provide Gregoire and Mix a defense against a tort claim filed by Janet L. Capps ("Capps"). The Complaint arises out of the *Beckman* litigation, in which the Office of the Attorney General ("OAG") failed to timely file an appeal from an adverse verdict in the trial court. An independent investigation concluded that, Capps, an Assistant Attorney General ("AAG") who had been on the *Beckman* trial team, mishandled key appeal documents. Capps resigned from her position. Capps claims that she was made a scapegoat and that she was improperly forced to resign. In November 2000 (amended October 2001), Capps filed a notice of claim against the State in which she said she intended to file a lawsuit, and named numerous individuals as possible defendants including Gregoire and Mix in their individual capacities. Capps has

never filed an actual tort lawsuit against Gregoire, Mix, the State of Washington or any other defendants.

2. State employees sued in tort lawsuits usually make a request that the Attorney General defend them in the lawsuit consistent with the statute that authorizes defense of state employees. The Attorney General grants these requests routinely as the statute generally is applied broadly to cover job-related acts or omissions. Exceptions to coverage occur when, for example, an employee intentionally injures someone, clearly violates a law (unless in good faith), or conducts personal activities on state time or using state resources. Usually the OAG represents all defendants in tort litigation, but occasionally it hires outside lawyers to serve as Special Assistant Attorneys General.
3. When Capps filed her notice of claim, the OAG appointed Stafford Frey, a Seattle law firm, as outside counsel and Special Assistant Attorney General. The OAG appointed outside counsel because the claim involved employees of the OAG and the OAG sought to avoid any appearance of a conflict of interest which might arise if the OAG handled the litigation itself. Respondents Gregoire and Mix, through a collaborative process involving other OAG staff, were involved in the decision to retain outside counsel. The State of Washington is paying Stafford Frey's bills. The contract appointing Stafford Frey names Mix as the primary point of contact for Stafford Frey. When a Notice of Tort claim is filed against the State, it is not unusual for settlement discussions to occur before a suit is actually filed, as occurred in this instance. When this happens, the OAG or outside counsel will represent the state but will require a release of all anticipated state defendants should a settlement be reached.
4. After the retention of the Stafford Frey firm, the initial assessment of the OAG was that some individuals named in the tort claim would likely be entitled to defense in the event Capps filed a lawsuit. This initial assessment was a collaborative process in which Respondents and

other OAG staff participated. However, because no lawsuit has been filed and there has been no submission by any named defendants of a request for defense pursuant to RCW 4.92., there has been no final decision on who will receive state-funded defense in the event of litigation. In the event a lawsuit were filed, Mix and Gregoire will ask Deputy Attorney General David Walsh to review requests for defense from all defendants, including their own defense requests, in collaboration with the Office of Risk Management and determine who should receive defense.

**B. Applicable Law**

1. Pursuant to RCW 43.10, the Attorney General represents all state agencies and officials in litigation-related matters. The Attorney General may delegate such responsibility to outside counsel designated as Special Assistant Attorneys General.
2. RCW 4.92.100-.110 require the filing of a notice of claim with the Office of Risk Management before any tort action against the State of Washington or individual state employees can be filed.
3. Pursuant to RCW 4.92.060, once a tort lawsuit is filed against a state employee, the employee may request defense by the Attorney General. If granted, defense entitles the employee to indemnification by the State of Washington. RCW 4.92 does not provide an alternative approval process for requests for defense where an OAG employee is a defendant in a tort lawsuit.
4. The Attorney General has broad powers of delegation and has the power to appoint assistants to perform any act which the Attorney General is authorized by law to perform. RCW 43.10.060.
5. RCW 42.52.160 provides that no state employee may employ or use any person, money, or property under the officer's or employee's official control or direction or in his or her official capacity, for the private benefit or gain of the office, employee or another.
6. The King County Superior Court has concluded in a separate mandamus action by Ms. Capps that there was no evidence that the Attorney General's Office had acted in violation of RCW

4.92, or unethically, in handling her tort claim and initial representation matters. The court refused to disqualify Stafford Frey as counsel.

**C. Conclusions of Law**

1. Pursuant to chapter 42.52 RCW, the Board has jurisdiction over the Respondents, Christine O. Gregoire and Kathleen D. Mix, and over the subject matter of this complaint.
2. Pursuant to WAC 292-100-090(1), the parties have the authority to resolve this matter under the terms contained herein.
3. Settlement of this matter on the terms herein is subject to WAC 292-100-090(2), which states in part:

The board has the option of accepting, rejecting, or modifying the proposed stipulation or asking for additional facts to be presented. If the board accepts the stipulation or modifies the stipulation with the agreement of respondent, the board shall enter an order in conformity with the terms of the stipulation. If the board rejects the stipulation or respondent does not agree to the board's proposed modification to the stipulation, the normal process will continue. The proposed stipulation and information obtained during formal settlement discussion shall not be admitted into evidence at a subsequent public hearing.

**D. Resolution**

Based on the foregoing, in resolution of the complaint, the parties stipulate that:

1. Reasonable minds may differ regarding the interpretation of the applicable laws and whether Respondents committed any violation of the state ethics law by authorizing Stafford Frey to take initial steps to represent the state and by anticipating who would likely be entitled to defense should a lawsuit ever be filed by Ms. Capps. Respondents agree that it is both important and useful to explicitly state and document the policies and procedures of the Office of the Attorney General ("OAG") for determinations of whether defense will be granted at state expense where the Attorney General or her assistants are personally named as defendants or potential defendants. Respondents have caused to be promulgated explicit

OAG policies on this subject that will avoid disputes and define procedures in the future. The terms of those policies are attached to this Stipulation and Order as Exhibit A, and hereby are incorporated by reference into this Stipulation and Order. From time to time, the OAG in consultation with Risk Management may revise these policies to ensure the appropriate and efficient use of resources.

2. The purpose of the state ethics laws is well served by the OAG adopting specific policies for RCW 4.92.070 determinations where the Attorney General or her assistants are personally named as defendants or potential defendants. However, the Attorney General and AGO are named as defendants in numerous lawsuits, simply because of the duties or title of the office, and the policies can and should attempt to accommodate this.
3. Had the policies embodied in Exhibit A been in force at the time of the violations alleged here, they might have prevented the allegations of violations of the Ethics in Public Service Act at issue.
4. Based on the facts of this particular complaint and based upon the investigation of the Board's investigator, in the event this matter were to have proceeded before the Board, the Board may have concluded that there was cause to have a full evidentiary hearing about whether there was any violation of RCW 42.52.160.
5. Respondents are and agree to remain familiar with and in compliance with state ethics laws in the performance of their official duties.

**E. Release/Effect of Order**

1. If the Board accepts this Stipulation, the Board releases and discharges Respondents from all ethics proceedings and related costs and fees under chapter 42.52 RCW for matters arising out of the facts contained in this complaint. Respondents agree to release and discharge the Board, its officers, agents, and employees from all claims, damages, and causes of action arising out of this complaint and this Stipulation and Order.

2. If this Stipulation is accepted, this Stipulation and Order will be inadmissible for any purpose in any other proceeding involving Respondents, the State, and/or third parties aligned with the State.
3. If this Stipulation is accepted, this Stipulation and Order is enforceable under RCW 34.05.578 and any other applicable statutes and rules.

**F. Certification**

CHRISTINE O. GREGOIRE AND KATHLEEN D. MIX, hereby certify that each has read this Stipulation and Order in its entirety; that each has had an opportunity to consult with legal counsel; that each knowingly and voluntarily waives her right to a hearing in this matter; and that each fully understands and voluntarily agrees to this Stipulation.

EXECUTED this \_\_\_\_\_ day of September, 2002.

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CHRISTINE O. GREGOIRE  
Respondent

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JENNY A. DURKAN  
Attorney for the Respondent Gregoire

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KATHLEEN D. MIX  
Respondent

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KENT A. CAPUTO  
Attorney for the Respondent Mix

Stipulated to and presented by:

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DAVID N. BRUCE  
Special Assistant Attorney General

## II. ORDER

Having reviewed the proposed Stipulation, WE, THE STATE OF WASHINGTON EXECUTIVE ETHICS BOARD, pursuant to WAC 292-100-090, HEREBY ORDER that the Stipulation is

\_\_\_\_\_ ACCEPTED in its entirety;

\_\_\_\_\_ REJECTED in its entirety;

\_\_\_\_\_ \*MODIFIED. This Stipulation will become the Order of the Board if the following modifications are approved by \_\_\_\_\_.

\_\_\_\_\_  
\_\_\_\_\_

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

\_\_\_\_\_  
Laquita Fields, Chair

\_\_\_\_\_  
Sutapa Basu, Member

\_\_\_\_\_  
Paul Zellinsky, Member

**ADMINISTRATIVE POLICY  
THE OFFICE OF THE ATTORNEY GENERAL  
STATE OF WASHINGTON**

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**GENERAL TOPIC:** Legal/  
Professional

**REFERENCES:** RCW 4.92.070;  
RCW 4.92.075; Request for  
Individual Defense and  
Indemnification Form (AG Form  
#163 may be obtained from  
Document Services)

**SUBJECT:** Requests for Defense

**RESOURCE CONTACT:** Assigned  
Deputy Attorney General or  
Senior Assistant Attorney  
General

**APPROVED:** \_\_\_\_\_  
(Date)

**SCOPE:** All Employees of the  
Office of the  
Attorney General

\_\_\_\_\_  
CHRISTINE O. GREGOIRE  
Attorney General

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**I. POLICY STATEMENT:**

Pursuant to RCW 4.92.070 and .075, and subject to the conditions and limitations stated below, the Attorney General will provide state officers, employees, and other covered persons with legal defense for actions or claims instituted against such persons arising out of activities performed in good faith within the scope of their duties. Upon determination by the Deputy Attorney General or Senior Assistant Attorney General assigned to review requests for defense that such persons qualify for representation, an assistant attorney general will be assigned to the case, and the state will pay expenses and settlement costs or monetary damages related to such actions or claims, subject to any limitations imposed by law. (Defense and indemnification of actions against regents, trustees, officers, employees, or agents of institutions of higher learning come with the provisions of RCW 28B.10.842 and .844.)

When a tort claim is filed relating to the direct conduct of the Attorney General or employees of the office, the Attorney



General may appoint outside counsel to defend the State and state employees eligible for defense at state expense rather than having the Attorney General's Office defend the action itself. In order to avoid claims of conflict in appropriate cases, the Attorney General's Office may appoint outside counsel to undertake representation of the interests of the State upon the filing of the tort claim, or once a lawsuit has been filed. Appointment of counsel is not, however, a determination as to whether to grant defense to individual Attorney General Office employees.

#### A. General Process for Requests for Defense in Tort Lawsuits.

State officers, employees, or other covered persons who believe that they are entitled to defense and indemnification at state expense shall submit, through appropriate agency supervisors for review and recommendation, a written request to the Attorney General in the form provided by the office agreeing to the conditions and limitations stated in the form and set out below.

The Request for Defense form, once signed by the individual, should be forwarded to the chief of the division representing the person's agency. The division chief, or designee, should review the complaint and conduct a preliminary investigation of the facts of the case to the division chief's satisfaction. The division chief, or designee, should then forward the matter to the appropriate agency official for review and recommendation, and return to the division chief. If the division chief concurs in the agency's recommendation, the division chief or designee should endorse the Request for Defense form and forward it to the reviewing Deputy or Senior Assistant Attorney General. If the division chief is recommending that the request for defense and indemnification be denied, or if the division chief's recommendation is different than the client's, the form should be accompanied by a memorandum explaining the basis for the recommendation.

In considering a request for defense and indemnification, the reviewing Deputy or Senior Assistant Attorney General may require the person making the request to provide information, and may conduct such other investigation into the facts and circumstances as the reviewing Deputy Attorney General or Senior Assistant Attorney General deems necessary. The Attorney General provides defense and indemnification only to the extent the person was acting within the scope of employment or duties, and in good faith. If the reviewing Deputy Attorney General or Senior Assistant Attorney General determines the acts or omissions upon which the action or claim are based are

not within the person's official duties or not in good faith, the request for defense and indemnification may be denied.

A finding that actions by an officer, employee or other person applying were not in good faith is expected to occur infrequently. The following are examples of types of conduct which will normally be deemed to have been taken in bad faith: (1) the act was committed with the willful intention of causing injury or harm, or was reckless or malicious in nature; (2) the act was committed in willful, knowing violation of law or regulations; or (3) the act was committed while under the influence of alcohol or a controlled substance.

The Attorney General defends a covered person as part of defending the state, representing both the state and the individual. The assistant attorney general assigned to the case is not a personal attorney for the covered person. The assistant attorney general may also be representing the state or a state agency, and may also be defending other covered persons. Any information provided by the person being defended may be provided to the employing or defendant agency, may be used in defense of the state or other defended persons, and may be used to decide whether continued legal defense by the Attorney General, and indemnification, is appropriate. If a covered person has a private claim arising from the same incident, the Attorney General cannot prosecute that claim and the person should retain private counsel.

Any person for whom the Attorney General provides legal defense shall cooperate fully with the assigned assistant attorney general in handling or resisting the action or claim as a condition for the afforded protection.

Whenever the Attorney General provides legal defense and authorizes indemnification on behalf of a person, the Attorney General reserves the sole right to control the defense of the action or claim, and to compromise, settle or defend the matter.

If the facts known at the time of initiation of the action or claim are insufficient to determine whether the person qualifies for defense and indemnification, the Attorney General may initially provide for limited legal defense only, such as filing a notice of appearance and answer, reserving any decision as to whether continued defense will be provided until such time as sufficient facts are available to determine the person's eligibility for defense and indemnification.

If after the Attorney General approves defense and indemnification of a person it becomes apparent that the person was not acting within the scope of employment or in good faith, is not cooperating, or if the person chooses to file suit against an agency or other person being defended over the same matter, the Attorney General may withdraw authorization for defense and indemnification of that person.

In the course of an attempt to mediate or settle a tort claim against the State or its agencies, a need may arise to authorize the Office of the Attorney General or a Special Assistant Attorney General to seek a release that includes the individuals who may be entitled to a state-funded defense and indemnification as well as the interests of the State and its agencies in order to achieve a process and settlement that fully protects the state interests. This is not to be considered individual representation.

#### B. Request for Defense by Attorney General Office Employees.

No individual in the Attorney General's Office shall approve his or her own request for defense. If the Deputy Attorney General or Senior Assistant Attorney General who holds a regular assignment to review and approve requests for defense is named as a defendant, then another Deputy Attorney General shall review and determine whether to approve the request for defense. No employee in the Attorney General's Office who is named as a defendant shall exercise supervisory authority over the decision of whether the request for defense will be approved. In situations where the Attorney General has had direct involvement in the matter that is the subject of the action, the Attorney General's Office will consult with the Office of Risk Management regarding the review and determination of any request for defense.

## II. PROCEDURE:

### Responsibility:

Employee

### Action:

Completes Request for Defense and Indemnification form (AG Form #163 may be obtained from Document Services) and submits form to the division chief of the Attorney General's Office representing the employee's agency, along with a copy of the complaint or document which

has caused the employee to seek representation.

Division Chief

Reviews the complaint and conducts, as necessary, a preliminary investigation of the facts of the case. (Forwards the matter to the appropriate agency official for review and recommendation and has that individual return the RFD form back to him/her). If the division chief concurs with the agency's recommendation, she/he endorses the Request for Defense and forwards it to the reviewing Deputy or Senior Assistant Attorney General. If the agency recommends the denial of the request, or the division chief recommends a different result from the agency's, the form should be accompanied by a memo from the division chief to the reviewing Deputy Attorney General or Senior Assistant Attorney General explaining the basis for the recommendation.

Deputy Attorney General or  
Senior Assistant Attorney  
General

Reviews the Request for Defense, complaint, any materials provided, and, if necessary, requests further information in order to reach a determination of approval or denial.

If approved, returns original form to assistant attorney general handling the case and sends a copy to the employee.

If denied, a letter will be sent to the employee explaining the state's position, a copy of which will be sent to the assistant attorney general handling the case.

